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No. 165

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In the Supreme Court of the United States

OCTOBER TERM, 1961

HOMARD P. DORSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 330-332; Pet. App. 2-4) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1961 (R. 329; Pet. App. 1). The petition for a writ of certiorari was filed on June 21, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the petitioner's conviction for having conspired to manufacture, possess, and distribute untaxed whiskey.

2. Whether certain statements of conspirators made in furtherance of the conspiracy were admissible into evidence.

3. Whether the petitioner, who did not object to the charge, was prejudiced by the fact that the trial court instructed the jury with respect to testimony by accomplices, although no accomplices testified for the government.

RULE INVOLVED

Rule 30, F. R. Crim. Proc., provides in pertinent part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

STATEMENT

An indictment returned in the District Court for the Eastern District of Tennessee charged the petitioner and eight others with having conspired from about June 1, 1959, to April 13, 1960, to manufac-

ture, possess, and distribute untaxed whiskey, and to possess goods and commodities used in the manufacture of whiskey, in violation of various sections of the Internal Revenue Code (R. 5-13). Following a trial by jury, the petitioner and six others were convicted (R. 325). The petitioner was sentenced to five years' imprisonment (R. 15). On appeal the court of appeals unanimously affirmed the conviction of petitioner, who was the only defendant to appeal (R. 329, 330-332; Pet. App. 1, 2-4).

The pertinent evidence may be summarized as follows:

1. For several years prior to 1959, the petitioner, who had the nickname "Pot", owned and operated a chicken farm in Cosby, Cocke County, Tennessee. He also repaired automobiles and operated a small grocery store on his premises (R. 88-89, 180-182, 208-213). From June 1, 1959, to April 13, 1960, the Taylor Grocery Company of Newport, Tennessee (a city near Cosby), sold the petitioner 77,200 pounds of sugar, 190 cases of isopropyl alcohol (24 bottles per case),[1] most of which was "Craig" brand, 195 cartons of yeast (54 packages per carton), and 2,300 dozen half-gallon fruit jars (27,600 jars) (R. 40-43; see R. 224-228, 232, 236-237, 241, 243).

2. On August 13, 1959, Alcohol Tax Unit agents found several illegal distilleries in the Cosby area of Cocke County, and set up observation positions near

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[1] Isopropyl alcohol is used as an additive to whiskey to increase the proof (R. 85).

the road leading to the stills. The agents observed co-defendants Leroy Sutton (who lived in a house on the petitioner's premises) and Charles Grooms loading whiskey onto a 1940 pick-up truck (R. 54, 152-154). Late that afternoon, a black 1937 Ford coach, with a "bulldog ornament" on the hood, stopped close to a cache of whiskey which was near the main highway in the general area of the stills. A burner, condenser, pressure tank, and whiskey were loaded into the car (R. 56-57, 155). The car and the pick-up truck were the same vehicles which had been previously observed on the petitioner's farm (R. 49-50, 52-53). On many occasions between August 13 and November 1959, Alcohol Tax Unit agents observed the same vehicles on the petitioner's premises (R. 57-58, 63-64, 68-69, 76-77, 79, 90-91, 111-113, 155-156, 166-168, 170, 200).

On August 23, at about 12:30 p.m., an automobile and a large "van-type" truck, both bearing North Carolina license plates, pulled up into the petitioner's farm and the men from the vehicles went into the house (R. 65-66, 75). Shortly thereafter, co-defendants Cleona Hooper and Harry Dorsey (the petitioner's son) drove up to the house and went inside (R. 66). Later, the petitioner and Hooper each brought out a 24-bottle carton of Craig brand isopropyl alcohol which they loaded in Hooper's automobile (R. 66-67). Still later, the petitioner and Hooper loaded a pressure tank and oil burner (commonly used to fire stills in the Cosby section) into the 1937 Ford coach (R. 68). That afternoon, the petitioner and three co-defendants unloaded half-gallon "Lamb" brand fruit

jar cartons out of the North Carolina truck and placed them in a pick-up truck which was driven off by petitioner's son over Ogle Hill on Rooster Town Road (R. 70-73). The son made two additional trips that afternoon, in the same direction, with a load of the fruit jar cartons (R. 70-73). On September 27, 1959, A.T.U. agents searched the house of a co-defendant which was located over Ogle Hill on Rooster Town Road, about two miles from the petitioner's house. They seized 675 gallons of illicit whiskey, 35 cases of which were contained in "Lamb" brand half-gallon fruit jars, and several empty cartons of "Craig" brand isopropyl alcohol (R. 82-84). Agent Roy Tubb testified that he had been investigating illicit distilleries in Cocke County for about fourteen years, and that he had not seen "Lamb" brand fruit jars in that county for about ten years (R. 74). On the same day, the agents seized and destroyed an illicit distillery located on the petitioner's farm about a mile from his house (R. 80-81, 167-168).

On two occasions in early November, A.T.U. agents saw co-defendant Sutton drive up to illicit distilleries in a black 1937 Ford coach and stir mash or operate the stills (R. 93-95, 170, 200-201). On November 15, 1959, the agents executed a search warrant relating to Sutton's house which was on the petitioner's farm, about 250 or 300 yards from the petitioner's house (R. 90, 97-99). The agents seized 17 gallons of illicit whiskey in half-gallon jars, 35 cases of empty half-gallon jars, and a large number of empty cartons of "Craig" brand isopropyl alcohol (R. 98-99). On November 24, Sutton was arrested at his home pursuant

to a warrant. At that time, the agents found 1,740 pounds of sugar, seven oil burners, and pressure tanks of the type to fire stills. Shortly thereafter, the petitioner made arrangements to have bonds executed on behalf of Sutton and another co-defendant (R. 101-102, 253).

On March 24, 1960, the petitioner purchased 120 4x8x16 cinder building blocks, 100 feet of garden hose, and 250 feet of 12.2 Certex inside house wiring (R. 25-26, 32, 39). On April 13, 1960, the agents located and destroyed a distillery on a farm which was located about two miles from the petitioner's (R. 179, 187-188). At the distillery site, the agents found 250 feet of inside electric house wiring, a 12.2 Certex box, 25 feet of garden hose, burners with pressure tank, and 15 cases of empty half-gallon jars (R. 174-177). The furnace around the "still pots" was made out of 175 4x8x16 cinder building blocks, most of which were new (R. 175). The distillery had been "set up" about "two to three weeks" prior to its seizure (R. 179).

3. On September 16, 1959, agents observed three of the co-defendants at a distillery. An agent testified (R. 163; see also R. 192):

> BY THE WITNESS: One of them stated that that "G-d "Pot" and Harry wouldn't even get a watchman for us. They are funny people. They are all for themselves. I tried to get one of them to get Woodrow to watch for us at night, but they wouldn't." He said, "I don't want to go to the G-d pen over these stills."

ARGUMENT

1. Contrary to the petitioner's first contention (Pet. 7-9), the evidence, viewed in its totality, was sufficient, as the court of appeals found (R. 331; Pet. App. 3), to support the conviction; and there is no need for further review. The petitioner's attempt (Pet. 7, 8) to discredit *seriatim* each item of evidence against him as being insufficient to show his connection with the conspiracy ignores the principle that the evidence must be viewed as a whole. At the very least, the evidence was sufficient to show that the petitioner knew of the conspiracy and actively supported it, not merely by furnishing supplies but by affording the conspirators a base of operations. This in itself was the "informed and interested cooperation" which renders petitioner liable as a co-conspirator. See *Direct Sales Co.* v. *United States*, 319 U.S. 703, 713.

2. Before the agent testified to overhearing persons at the still complain about "Pot" and "Harry" not furnishing a watchman (see the Statement, *supra*, p. 6), the following took place (R. 163):

> MR. RAY H. JENKINS [Counsel for the petitioner]: Now, of course, your Honor will instruct the jury as to what anybody said, the men that were present.
>
> THE COURT: Gentlemen of the jury, this alleged statement, alleged to be made by these men, will not be considered except with respect to their cases. Unless the jury finds, first, there was a conspiracy, and, second, that these statements were made in furtherance of the conspiracy. If the jury so finds, then the jury will

> consider the alleged statement with respect to all of the defendants.

The agent then related the conversation and testified that he knew petitioner to be called "Pot" (R. 163).

The petitioner contends (Pet. 9-10) that the trial court erred in admitting this testimony because the conversation was not made pursuant to the conspiracy and because the petitioner "was not identified in the statement." The conversation, however, was made in furtherance of the conspiracy, because security precautions were necessary to the continued operation of the stills. The petitioner was sufficiently identified as "Pot". In addition to the agent, the petitioner and his wife testified that petitioner was known as "Pot" (R. 208, 261), and all of the witnesses from Tennessee knew the petitioner by that name (see R. 24-25, 38, 41-42, 61, 104, 155, 164, 195, 199, 204, 255-256, 260).

The testimony in question was thus properly admitted with the cautionary instruction which the petitioner requested. It is settled that the declarations of a conspirator made in furtherance and during the life of a conspiracy are admissible against absent co-conspirators who are found by independent evidence to have been members of the conspiracy. *Glasser* v. *United States*, 315 U.S. 60, 74-75; *Delli Paoli* v. *United States*, 352 U.S. 232, 237-242; *Blumenthal* v. *United States*, 332 U.S. 539, 550-553.

3. At the trial, the witnesses for the government consisted of Alcohol Tax Unit agents and witnesses connected with the firms which supplied the petitioner with materials. The petitioner, a co-defendant,

and six other witnesses testified for the defense. In its instructions to the jury, the court charged, in part (R. 313-314):

> It sometimes happens in criminal prosecutions, where two or more persons have participated in the commission of crime, that one of those persons becomes a witness for the Government against the other participants. Testimony of such a witness is classified as that of an accomplice. * * *

The judge then gave instructions that the testimony of an accomplice should be viewed with caution and not relied upon too firmly unless corroborated. The petitioner contends (Pet. 10) that, inasmuch as there were no accomplices who testified for the government, this charge was reversible error. Since the petitioner did not object to the charge or call the matter to the attention of the trial court at the time when it could have been remedied, he has no cause to complain on appeal. Rule 30, F. R. Crim. Proc., *supra*, p. 2. Moreover, petitioner can show no prejudice from the instruction even if, as he suggests, the jury might have deemed it applicable to the overheard conversation at the still (*supra*, p. 6). If that were so, the effect of the charge would be that the conversation had to be viewed with caution and corroborated before the jury could use it against petitioner. On this score, the petitioner would have received more than his due.

CONCLUSION

For these reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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